

**FILED**

**AUG 02 2012**

**PATRICK E. DUFFY, CLERK**

**By** \_\_\_\_\_  
**DEPUTY CLERK MISSOIT**

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF MONTANA**

**HELENA DIVISION**

ROBERT PETERICH,	)	CV 12-02-H-DWM-RKS
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
THE STATE OF MONTANA	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff Robert Peterich alleges he fell and injured his rotator cuff in the Lewis and Clark County Jail in October 2009. United States Magistrate Judge Keith Strong entered Findings and Recommendation on July 10, 2012, and recommended dismissing Peterich's complaint for failure to state a claim upon which relief may be granted. Plaintiff did not timely object to the Findings and Recommendation, and so has waived the right to de novo review of the record. 28

U.S.C. § 636(b)(1). This Court will review the Findings and Recommendation for clear error. McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981). Clear error exists if the Court is left with a “definite and firm conviction that a mistake has been committed.” United States v. Syrax, 235 F.3d 422, 427 (9th Cir. 2000).

Judge Strong informed Peterich that his allegations of denial of medical care were insufficient to state a federal constitutional claim in the March 2, 2012 Order. In his Amended Complaint, Peterich did not provide any additional facts regarding his medical care. Judge Strong found that mere medical malpractice is not enough to state an Eighth Amendment claim. After a review of Judge Strong’s Findings and Recommendation, I find no clear error. Accordingly,

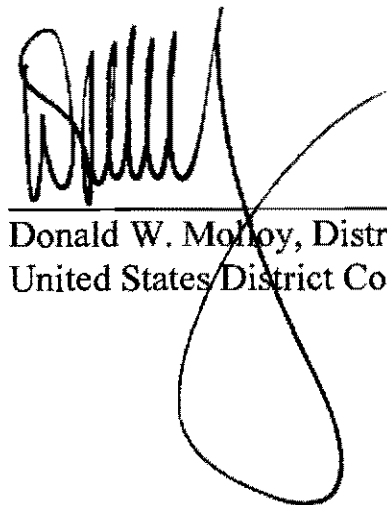
IT IS HEREBY ORDERED that Judge Strong’s Findings and Recommendation (dkt # 10) are adopted in full. This matter is DISMISSED WITH PREJUDICE for failure to state a claim upon which relief may be granted.

The Clerk of Court is directed to close this matter and enter judgment in favor of Defendants pursuant to Rule 58 of the Federal Rules of Civil Procedure.

The Clerk of Court is directed to have the docket reflect that this dismissal counts as a strike pursuant to 28 U.S.C. § 1915(g) based on Peterich’s failure to state a claim upon which relief may be granted.

The Clerk of Court is directed to have the docket reflect that the Court certifies pursuant to Fed.R.App.P. 24(a)(3)(A) that any appeal of this decision would not be taken in good faith. Peterich's failure to state a claim is so clear no reasonable person could suppose an appeal would have merit. The record makes plain the instant Complaint is frivolous as it lacks arguable substance in law or fact.

Dated this 2<sup>nd</sup> day of August, 2012.



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Donald W. Molloy, District Judge  
United States District Court